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SJC-12966

DAPHNE MOORE vs. EXECUTIVE OFFICE OF THE TRIAL COURT.

Suffolk. December 7, 2020. - July 8, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, & Wendlandt, JJ.

Trial Court. Court Administrator. Public Employment,
Suspension. Due Process of Law, Employment.
Constitutional Law, Equal protection of laws.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on May 7, 2020.

The case was heard by Kafker, J.

John M. Thompson (Linda J. Thompson also present) for the plaintiff.

Denise Tsai, Special Assistant Attorney General, for the defendant.

BUDD, C.J. The plaintiff, Daphne Moore, was suspended without pay from her position as an assistant clerk-magistrate in the Superior Court in Hampden County following her indictment on felony charges. Moore sought relief from a single justice of this court arguing that the Executive Office of the Trial Court

(Trial Court) exceeded its statutory authority by acting pursuant to a provision of its personnel manual that mandated suspension without pay of employees charged with felonies; she was deprived of due process; and application of the Trial Court's suspension policy violated her right to equal protection of the laws. For the reasons that follow, we affirm the denial of Moore's petition for relief.

Background. Moore is an assistant clerk-magistrate in the Superior Court. On December 20, 2018, a Federal grand jury indicted her on charges of conspiracy to possess and distribute narcotics, narcotics possession and distribution, money laundering conspiracy and money laundering, and making false statements to Federal officers. See United States vs. Moore-Bush, U.S Dist. Ct., No. 3:18-cr-30001-WGY-6 (D. Mass. Dec. 20, 2018). She was arrested the next day, and thereafter arraigned and released on her own recognizance pending further proceedings in the Federal court.

Shortly thereafter, Moore was suspended without pay pursuant to § 16.600(B) of the Trial Court Personnel Policies and Procedures Manual (Manual), which provides in relevant part that a Trial Court employee who is the subject of a criminal complaint or indictment for a felony, including a felony not involving misconduct in office, "shall be suspended without pay until the conclusion of the criminal proceedings."

Moore requested and received a hearing, at which she was represented by counsel, before the clerk of the Superior Court in Hampden County and the Trial Court's deputy labor counsel. See Manual, §§ 16.401(B)(2) & 16.600(B). Following the hearing, Moore submitted material relating to the underlying merits of and delays in the Federal criminal case against her. The Trial Court affirmed Moore's suspension without pay pursuant to § 16.600(B) of the Manual, concluding that she had offered no evidence to rebut the determination that she had been indicted for a felony not involving misconduct in office.

Moore sought reconsideration of the decision, citing this court's order suspending a District Court judge with pay following the judge's indictment on Federal charges of obstruction of justice, the suspension of a Superior Court judge with pay following her arrest on charges of domestic violence, and the delays in Moore's own criminal trial as reasons favoring her reinstatement with pay. The Trial Court again affirmed her suspension without pay. Moore thereafter filed a petition for relief pursuant to G. L. c. 211, § 3, in the county court. A single justice denied relief without a hearing, and Moore appealed to the full court.

Discussion. 1. Statutory authority to promulgate suspension rule. Moore contends that her suspension without pay was unauthorized because the bright-line rule in the Manual

mandating this outcome¹ improperly strips the Court Administrator of the Trial Court (Court Administrator) of his or her discretionary decision-making authority conferred by statute. We disagree.

As the "administrative head of the trial court," the Court Administrator is "responsible for the management of court personnel, facilities, administration, security, and court business." G. L. c. 211B, § 9A, second & third pars. Among other things, the Court Administrator is responsible for "establish[ing] and promulgat[ing] standards for the appointment, performance, promotion, continuing education and removal of all personnel within the trial court, except judges, clerks and registers of probate."² G. L. c. 211B, § 8. See

¹ Section 16.600(B) of the Trial Court Personnel Policies and Procedure Manual (Manual) provides in pertinent part:

"An employee who is indicted for misconduct in office (G. L. c. 30, [§] 59) or who is the subject of a criminal complaint or indictment for a felony not involving misconduct in office, shall be suspended without pay until the conclusion of the criminal proceedings. . . . The appointing authority must notify an employee who is suspended under this provision that the employee may ask to be heard on whether or not suspension is warranted, but such request shall not delay the imposition of the suspension. Following disposition of the criminal case, an employee may be subject to disciplinary action consistent with this section."

² The exemption for "clerks" does not include assistant clerk-magistrates, such as Moore. See Perullo v. Advisory Comm. on Personnel Standards, 476 Mass. 829, 835 (2017) ("it is clear

G. L. c. 211B, § 9A (iii) (Court Administrator shall "provide personnel management, including . . . establishment of system wide personnel policies"). In addition, the Court Administrator is authorized, "when necessary to ensure the proper administration of justice, . . . [to] impose discipline on such officers and employees, including dismissal and suspension with or without pay." G. L. c. 211B, § 9A (xii).

Read together,³ these statutory provisions confer upon the Court Administrator the power to establish standards for employee discipline, including standards for removal and suspension,⁴ as well as the power to implement and apply those

to us that, in [G. L. c. 211B,] § 8, the Legislature has purposefully distinguished between 'clerks' and 'assistant clerks').

³ Moore argues that the introductory clause of G. L. c. 211B, § 9A (xii), which states, "notwithstanding any general or special law to the contrary," precludes reliance on G. L. c. 211B, § 8, as a source of authority to issue standards governing discipline. In our view, § 8 is consistent with, rather than contrary to, § 9A (xii).

⁴ Moore argues that § 8 establishes the Court Administrator's authority to promulgate standards only for employee appointment, performance, promotion, continuing education, and removal, but not for employee suspension. It would make little sense if the Court Administrator were empowered to define standards of employee conduct and performance, but not to establish standards of discipline short of removal for violation of those standards. See, e.g., Tobin v. Sheriff of Suffolk County, 377 Mass. 212, 214 (1979) (authority to remove court officer includes authority to suspend). Cf. Fragopoulos v. Rent Control Bd. of Cambridge, 408 Mass. 302, 304 (1990) (authority to deny application completely includes power to grant application subject to conditions).

standards to Trial Court employees, including assistant clerk-magistrates like Moore. See Malloch v. Hanover, 472 Mass. 783, 791 (2015) ("We interpret separate sections of statutes as a whole, to produce internal consistency and to give a rational and workable effect" [quotations and citations omitted]).

Moore argues that the suspension mandate found in § 16.600(B) of the Manual is invalid because the inclusion in G. L. c. 211B, § 9A (xii), of the phrases "when necessary to ensure the proper administration of justice" and "with or without pay" limits the Court Administrator's rulemaking authority and requires an individualized, case-by-case assessment before an employee may be suspended without pay. However, nothing in the plain language of G. L. c. 211B, § 8 or § 9A (xii), prohibits the Court Administrator from making a categorical judgment, as he implicitly did here, that the proper administration of justice requires the suspension of Trial Court employees without pay when they have been indicted for a felony, both felonies involving and those not involving misconduct in office. See, e.g., American Hosp. Ass'n v. National Labor Relations Bd., 499 U.S. 606, 612 (1991) ("even if a statutory scheme requires individualized determinations, the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless [the Legislature] clearly expresses an intent to withhold that authority"); Massachusetts

Fine Wines & Spirits, LLC v. Alcoholic Beverages Control Comm'n, 482 Mass. 683, 692 (2019) ("agency has discretion to design rules that can be broadly applied, sacrificing some measure of 'fit' for administrability" [citation omitted]). Cf. Borden, Inc. v. Commissioner of Pub. Health, 388 Mass. 707, 716, cert. denied sub nom. Formaldehyde Inst., Inc. v. Frechette, 464 U.S. 936 (1983) (administrative agency has discretion to act by rulemaking or individual adjudication).

The adoption of a mandatory policy requiring suspension without pay in the case of any felony indictment thus does not reflect an abdication, but rather the exercise, of the discretion granted to the Court Administrator by G. L. c. 211B, § 9A (xii), to suspend a Trial Court employee without pay "when necessary to ensure the proper administration of justice."⁵ This is a reasonable rule of general applicability that is consistent with the statutory scheme and that ensures predictability and consistency in the imposition of Trial Court discipline when an

⁵ That § 16.600(B) of the Manual reflects the Court Administrator's exercise of discretion to discipline Trial Court employees is further evidenced by the fact that that section distinguishes between criminal complaints involving felonies and those involving misdemeanors and establishes different procedures for the imposition of discipline. While an employee charged with a felony must be suspended without pay, an employee "who is the subject of a criminal complaint involving a misdemeanor may be suspended without pay depending on the circumstances of the criminal complaint" (emphasis added). Manual, § 16.600(B).

employee faces serious charges of misconduct. See Massachusetts Fine Wines & Spirits, LLC, 482 Mass. at 692 ("uniform, bright-line rule" guiding agency enforcement of regulation avoids uncertainties). See also Dixon v. Love, 431 U.S. 105, 115 (1977) ("When a governmental official is given the power to make discretionary decisions under a broad statutory standard, case-by-case decisionmaking may not be the best way to assure fairness. . . . The decision to use objective rules . . . provides [employees] with more precise notice of what conduct will be sanctioned and promotes equality of treatment among similarly situated [employees]"). Promulgation of § 16.600(B) of the Manual constitutes a permissible exercise of the Court Administrator's authority under G. L. c. 211B, §§ 8 and 9A (xii), and Moore's suspension without pay upon the issuance of a Federal felony indictment was consistent with and mandated by its terms. See Citizens for Responsible Env'tl. Mgt. v. Attleboro Mall, Inc., 400 Mass. 658, 669 (1987) (actions taken pursuant to broad authority to effectuate statutory purposes command judicial deference). See also Massachusetts Fed'n of Teachers, AFT, AFL-CIO v. Board of Educ., 436 Mass. 763, 776-777 (2002) ("Where statutory language clearly authorizes actions taken by an agency, the actions are wholly lawful, and we need not look behind them to determine the agency's motives").

2. Due process claim. Moore also argues that the mandatory suspension-without-pay provision of § 16.600(B) of the Manual is invalid because it violates her constitutional right to due process. She asserts that, as a Trial Court employee, she has a property interest in her employment that prohibits her suspension absent an individualized determination that it is necessary to ensure the proper administration of justice. In her view, the bright-line rule set forth by § 16.600(B) supplanted the constitutionally-required standard for suspensions from Trial Court employment and thereby "nullified" her procedural due process right to appropriate notice and opportunity to be heard. We conclude that the single justice did not abuse his discretion or commit an error of law in finding that Moore was afforded constitutionally adequate procedures.

The "threshold issue" in considering Moore's procedural due process claim is whether there is "a constitutionally protected property interest at stake." Perullo v. Advisory Comm. on Personnel Standards, 476 Mass. 829, 840 (2017), quoting Mard v. Amherst, 350 F.3d 184, 188 (1st Cir. 2003). Assuming, without deciding, that Moore has a property interest in continued employment free from suspension without pay, and that she is entitled to an appropriate level of due process protection

before that interest may be disrupted,⁶ we conclude that the Trial Court's procedures satisfied due process.

"The fundamental requisite of due process is an opportunity to be heard at a meaningful time and in a meaningful manner." Matter of Kenney, 399 Mass. 431, 435 (1987). But due process "is flexible and calls for such procedural protections as the particular situation demands" (quotation and citation omitted). Mathews v. Eldridge, 424 U.S. 319, 334 (1976). See Haverhill Manor, Inc. v. Commissioner of Pub. Welfare, 368 Mass. 15, 24, cert. denied, 423 U.S. 929 (1975) ("Due process is a protean concept which imports different procedures in different situations or circumstances"). To determine what process is due,⁷ we balance three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest [in the process it employs], including the function

⁶ See Federal Deposit Ins. Corp. v. Mallen, 486 U.S. 230, 240 (1988) (bank president had property interest in continued employment free from arbitrary interference by regulating authority); Perullo, 476 Mass. at 840-841.

⁷ Historically, we have "treated the procedural due process protections of the Massachusetts and United States Constitutions identically." Matter of Powers, 465 Mass. 63, 80 n.18 (2013), quoting Hoffer v. Board of Registration in Med., 461 Mass. 451, 454 n.5 (2012).

involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Gillespie v. Northampton, 460 Mass. 148, 156 (2011), citing Mathews, supra at 335.

To begin, Moore has a significant interest in continued employment, and suspension without pay pending the resolution of a criminal matter may impose a substantial financial burden. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 543 (1985). Although suspension is less permanent than termination, the delays that often occur in criminal matters may render a suspension pursuant to § 16.600(B) of the Manual more like a termination than a suspension. See Gilbert v. Homar, 520 U.S. 924, 932 (1997) ("account must be taken of the length and finality of the deprivation" [quotation and citation omitted]). Indeed, Moore now has been suspended without pay for over two years while the Federal felony charges remain pending. Additionally, because § 16.600(B) of the Manual does not provide expressly for back pay upon a favorable disposition, Moore may not be made entirely whole even if the felony charges are later dismissed or otherwise resolved entirely in her favor.⁸

⁸ On this point, we note the Trial Court represents in its brief that an employee would be entitled to seek back pay upon a favorable resolution of his or her case, which could be authorized in the Court Administrator's discretion.

Although we do not discount the difficulties Trial Court employees like Moore may face due to the loss of income pending resolution of criminal proceedings, there is limited risk of erroneous suspension without pay under § 16.600(B) of the Manual. Moore's suspension was triggered by the issuance of a Federal felony indictment. As we have explained, supra, the promulgation of § 16.600(B) of the Manual reflects the Court Administrator's reasonable determination that the fact of a felony indictment alone endangers the proper administration of justice and supports suspension without pay. The return of an indictment itself "is an objective fact," which is independently verifiable and therefore less susceptible to error. Federal Deposit Ins. Corp. v. Mallen, 486 U.S. 230, 244 (1988). The return of a felony indictment also "establishes that an independent body has determined that there is probable cause" to believe that a serious crime has been committed, which "demonstrates that the suspension is not arbitrary." Id.

For these same reasons, we also conclude that additional procedures would be unlikely to afford Trial Court employees like Moore with greater protection than already provided in accordance with § 16.600(B) of the Manual. See Dixon, 431 U.S. at 113-114 (low risk of erroneous deprivation of driver's license in absence of hearing where suspension and revocation of license is "largely automatic" under applicable regulations;

additional procedures "would not serve to protect any substantive rights"). Through the publication of the Manual, Moore was on notice of the consequences of a felony indictment.⁹ She received notice that she was being suspended without pay as a result of the issuance of a felony indictment for misconduct not in office. And she was given an opportunity to be heard and to correct any misunderstanding or mistake regarding the triggering fact of the felony indictment.¹⁰

However, Moore argues that the Court Administrator must additionally consider the individual facts and circumstances in each case prior to determining that suspension without pay is necessary to guard the proper administration of justice. This likely would require the Court Administrator to delve into the merits of the underlying felony indictment and make an independent assessment of the pending charges and the evidence,

⁹ As relevant here, Trial Court employees also are notified that they can be subject to discipline for, among other things, "unauthorized use, sale, or possession of controlled substances, narcotics, or other drugs at any time," "violation of or failure to comply with Federal or State Constitution, statutes, or court rules and regulations," and "conduct, whether in the course of one's employment or otherwise, that tends to bring the court into disrepute or lessens public confidence in the administration of justice." Manual, § 16.100(B) (6), (7) & (23) (examples of conduct warranting disciplinary action).

¹⁰ For example, the mandatory suspension provision of § 16.600(B) would not apply if evidence had been presented showing that the indictment was for a misdemeanor or that Moore was not herself the subject of the felony indictment.

which may not be available. Due process does not require engaging in procedures that could create a significant risk of interference with a pending criminal matter and unduly and unnecessarily burden the Court Administrator. Henderson v. Department of Veteran Affairs, 878 F.3d 1044, 1050 (Fed. Cir. 2017) (where suspension was based on fact of indictment, government agency was not required to investigate employee's alleged criminal activity, which could "force a premature airing" of defenses [citations omitted]); Brown v. Department of Justice, 715 F.2d 662, 668 (D.C. Cir. 1983) ("mini-trial" not required and may interfere with ongoing criminal proceedings where suspension of employee based on fact of indictment).

Finally, the Trial Court's interest in ensuring the integrity of its employees is of paramount importance. The Trial Court has a substantial interest in maintaining public confidence in the judiciary, which is eroded when employees of the Trial Court are themselves indicted on felony charges, whether for conduct in or out of office. See Gilbert, 520 U.S. at 932 ("State has a significant interest in immediately suspending, when felony charges are filed against them, employees who occupy positions of great public trust and high public visibility").

More generally, courts have long recognized "the government's legitimate purpose in promot[ing] efficiency and

integrity in the discharge of official duties, and [in] maintain[ing] proper discipline in the public service" (quotation and citation omitted). Connick v. Meyers, 461 U.S. 138, 150-151 (1983). "To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch." (Citation omitted.) Id. at 151. See Bessette v. Commissioner of Pub. Works, 348 Mass. 605, 608 (1965) ("It is the ascertainable and indisputable fact of the indictment, quite apart from guilt, that makes continuance in office unsuitable"). Additionally, while recognizing the financial burden that suspension without pay imposes upon Moore, "the government does not have to give an employee charged with a felony a paid leave at taxpayer expense." Gilbert, 520 U.S. at 932.

By mandating suspension without pay, § 16.600(B) of the Manual serves the Trial Court's important interest by remedying the "untenable situation" and damage to the public confidence that would arise if a Trial Court employee who has been indicted for felony misconduct continued to perform public duties at the taxpayer's expense. See Benoit v. Boston, 477 Mass. 117, 122 (2017) (discussing purpose of G. L. c. 268A, § 25, which mandates suspension without pay of any county, municipal, or

district officer or employee under indictment for misconduct in office). See also Massachusetts Bay Transp. Auth. v. Massachusetts Bay Transp. Auth. Retirement Bd., 397 Mass. 734, 739 (1986) (discussing purpose of G. L. c. 30, § 59, which mandates suspension without pay of any Commonwealth officer or employee under indictment for misconduct in office).

Upon balancing these factors, we conclude that the single justice did not err in finding that the Trial Court's procedures satisfied due process.

3. Equal protection claims. Finally, Moore asserts that she has been denied equal protection of the laws on two separate grounds. She contends that similarly situated employees of the Supreme Judicial Court receive different consideration if indicted for alleged criminal conduct, and that she was treated differently from a District Court judge who was suspended with pay following her indictment on felony charges last summer.

The "equal protection mandate is essentially a direction that all persons similarly situated should be treated alike" (quotation omitted). Doe v. Acton-Boxborough Regional Sch. Dist., 468 Mass. 64, 75 (2014), citing Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985). See Opinion of the Justices, 332 Mass. 769, 779-780 (1955) ("Equal protection of the laws requires of course that all persons in the same

category and in the same circumstances be treated alike").¹¹ It acts as a "shield against arbitrary classifications." Enquist v. Oregon Dep't of Agric., 553 U.S. 591, 598 (2008). "An equal protection claim can only succeed if a plaintiff establishes that government action discriminates against similarly situated persons." DuPont v. Commissioner of Correction, 448 Mass. 389, 399 (2007). We discern no equal protection violation under either of Moore's claims.¹²

a. Trial Court and Supreme Judicial Court employees.

Section 10.6 of the Supreme Judicial Court Personnel Manual permits, but does not require, the suspension of employees without pay pending resolution of criminal charges against them, and this nonmandatory suspension provision applies whether the criminal charge is for a felony or a misdemeanor. Moore argues that Supreme Judicial Court and Trial Court employees are situated similarly because both categories are court employees,

¹¹ We evaluate claims for equal protection under the Massachusetts Declaration of Rights consistently with claims under the Federal Constitution. Brackett v. Civil Serv. Comm'n, 447 Mass. 233, 243 (2006).

¹² Although it is not entirely clear, Moore's reply brief contains an argument that may assert a separate equal protection claim based on race. If that is her claim, it is one that has not been previously raised, and it therefore comes too late. See Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 457 Mass. 663, 688 (2010). In any event, such a claim would lack merit, because § 16.600(B) of the Manual creates no distinction on the basis of an employee's race or other protected status, either on its face or as applied.

and that the different, and more favorable, treatment of Supreme Judicial Court employees who have been charged with a criminal offense constitutes differential treatment that violates her right to equal protection. This argument fails.

The Supreme Judicial Court and the Trial Court are independent, separate legal entities, each operating under different statutory schemes, and each vested with distinct authority over the management of their own employees.¹³ That these two public employers have adopted different policies concerning employee management does not demonstrate that the Trial Court itself treats similarly situated employees differently. Cf. Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. 122, 130, 131 (1997) (employees not "similarly situated" for purposes of proving discrimination where not subject to the same disciplinary policies).

Indeed, in exercising his discretion to promulgate employment policies by defining a standard for suspending without pay employees indicted for felony conduct unrelated to

¹³ As the Trial Court notes and as we previously have recognized, the Court Administrator is the administrative head of a court system consisting of seven different departments operating in approximately one hundred court locations throughout the Commonwealth and employing about 6,000 people. See Anzalone v. Administrative Office of the Trial Court, 457 Mass. 647, 659 (2010) (judicial notice taken of breadth of Trial Court); Annual Report on the State of the Massachusetts Court System Fiscal Year 2020 at 40 (number of Trial Court employees).

their office, the Court Administrator has ensured consistent treatment among Trial Court employees. See Lopez v. Davis, 531 U.S. 230, 244 (2001) ("case-by-case decisionmaking . . . could invite favoritism, disunity, and inconsistency"); Dixon, 431 U.S. at 115 (exercise of discretion to use objective rules "promotes equality of treatment among similarly situated" people subject to rule).

b. Trial Court staff and Trial Court judges. Separately, Moore compares her situation to that of District Court Associate Justice Shelley Joseph, who was suspended with pay following a Federal felony indictment. Moore argues that, although both she and Judge Joseph face Federal felony indictments, only Judge Joseph received the benefit of an individualized assessment of whether she should be suspended with or without pay pursuant to this court's exercise of its superintendence authority. See Matter of Joseph, Supreme Judicial Ct., No. OE-140 (Aug. 13, 2019). Moore argues that she too is entitled to an individualized assessment of the circumstances surrounding her case prior to a determination that suspension without pay is necessary. Such a result is not compelled by equal protection principles.

Despite the important role they play in the delivery of justice within our court system, assistant clerk-magistrates are not situated similarly to judges for the purposes of an equal

protection analysis. Not only are judges bound by a different set of rules and responsibilities and subject to a different disciplinary scheme than are assistant clerk-magistrates, but the role of a judge in making judicial decisions is also "unique and singular." *Matter of Joseph*, slip op. at 12 (Gants, C.J., concurring). "The dissimilar treatment of dissimilarly situated persons does not violate equal protection" (quotation and citation omitted). *DuPont*, 448 Mass. at 400, 402 (male and female inmates not similarly situated in relevant respects for purposes of equal protection claim).

Conclusion. For the foregoing reasons, the judgment of the single justice is affirmed.

So ordered.